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IN THE UNITED STATES DISTRICT COURT

8
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11 ASIS INTERNET SERVICES,
12 Plaintiff,

No. C 07-05357 CW

13 v.
14 IMARKETING CONSULTANTS, INC., dba
15 ULTRA-MX.COM, also dba SPEED
16 NETWORK, also dba SPEED-MX.COM,
and DOES ONE through FIFTY,
Inclusive,

ORDER DENYING MOTION TO
TRANSFER, GRANTING IN PART
MOTION TO DISMISS AND SETTING
CASE MANAGEMENT CONFERENCE

17 Defendants.

18 INTRODUCTION

19 Defendant Imarketing Consultants, Inc. moves pursuant to
20 Federal Rule of Civil Procedure 12(b)(2) and (6) to dismiss
21 Plaintiff Asis Internet Services' complaint, for lack of personal
22 jurisdiction and for failure to state a claim upon which relief can
23 be granted. Alternatively, Imarketing moves, pursuant to 28 U.S.C.
24 § 1404, to transfer venue to the Southern District of Florida.

25 These matters have been submitted on the papers. Having
26 considered all of the papers filed by the parties, the Court denies
27 the motions to dismiss for lack of personal jurisdiction and to
28 transfer venue, grants in part the motion to dismiss for failure to

1 state a claim, and grants Aspis leave to file an amended complaint.

BACKGROUND

The facts below are taken from Asis's complaint. The Court may also consider declarations in ruling on a motion to dismiss for lack of personal jurisdiction, see Data Disc, Inc. v. Systems Technology Assoc., Inc., 557 F.2d 1280, 1289 (9th Cir. 1977), and does so as noted below.

Asis is a California corporation and an internet service provider (ISP). Imarketing is a Florida corporation with its principal place of business in Palm Beach County, Florida. Complaint at ¶ 3. Imarketing's services have always been performed in Palm Beach County, Florida. Clouse Affidavit at ¶ 8. Imarketing does not have any employees or customers in California. Id. at 7. Imarketing does not advertise, own property, or have an address or phone listing in California. Id.

16 Imarketing directed, controlled and participated in
17 "spamming," causing more than 1,000 deceptive and unsolicited
18 commercial electronic messages to be sent to Asis's computer server
19 between May 10, 2007 and September 4, 2007. The header information
20 for those emails was falsified, misrepresented or forged. Asis
21 believes that Imarketing used illegal means to address these emails
22 to Asis's computer.

23 Asis alleges claims under the Controlling the Assault of
24 Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act),
25 15 U.S.C. § 7701 et seq., which restricts the transmission of
26 unsolicited commercial email. Specifically, Asis alleges
27 violations of 15 U.S.C. § 7704(a)(1) which prohibits the
28 transmission of fraudulent header information, 15 U.S.C.

1 § 7704 (b) (1) which prohibits address harvesting and dictionary
2 attacks, and 15 U.S.C. § 7704(b) (2) which prohibits automated
3 creation of multiple electronic mail accounts. Asis attaches the
4 following documents to its complaint: (1) samples of the subject
5 emails, which list the sender as "ultra-mx.com" and a postal opt-
6 out address as 1300 NW 17th Ave., Suite 218, Delray Beach, Florida
7 33445; (2) a record from WHOIS, a database that provides owner
8 information for domain names, which shows that Ultra-mx is
9 registered by "Domains by Proxy," a service that protects the
10 identity of its registrants; (3) a service description for "Domains
11 by Proxy," including its subpoena policy for identifying
12 registrants; (4) Imarketing's 2007 Annual Report, listing its CEO
13 as Robert Clouse and its address as 1200 NW 17th Ave., Suite 1,
14 Delray, FL, 33445; (5) printouts from Imarketing's website,
15 describing its services, and listing its contact address as 1300 NW
16 17th Ave., Suite 218, Delray Beach, FL 33445; (6) the source of the
17 IP address listed on the subject emails as an MCI source server
18 used by MCI customer Imarketing.

19 DISCUSSION

20 Imarketing first argues that it is not the correct entity to
21 be sued in that Asis alleges that it "cannot identify the sender of
22 the emails with absolute certainty because the emails were sent
23 with the domain name 'ultra-mx.com.'" Comp. at ¶ 3. Imarketing
24 also cites the declaration of its CEO, Robert Clouse, who, as noted
25 above, states that Imarketing does not do business in California,
26 does not advertise in California and is not sending emails to
27 anyone in California. However, Asis submits evidence that the
28 address listed on the subject emails is Imarketing's address, and

1 Imarketing does not dispute this. Furthermore, Mr. Clouse merely
2 states that Imarketing is not sending emails to California; he
3 fails to dispute Asis's allegation that Imarketing sent the subject
4 emails during the months of May through September, 2007.
5 Therefore, the allegations and evidence are sufficient to claim
6 that Imarketing is the entity that sent the subject emails.

7 I. Personal Jurisdiction

8 Imarketing argues the complaint must be dismissed due to a
9 lack of personal jurisdiction. Asis responds that the Court may
10 exercise specific jurisdiction over Imarketing.

11 Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a
12 defendant may move to dismiss for lack of personal jurisdiction.
13 The plaintiff then bears the burden of demonstrating that
14 jurisdiction exists. Schwarzenegger v. Fred Martin Motor Co., 374
15 F.3d 797, 800 (9th Cir. 2004). The plaintiff "need only
16 demonstrate facts that if true would support jurisdiction over the
17 defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995);
18 Fields v. Sedgwick Assoc. Risks, Ltd., 796 F.2d 299, 301 (9th Cir.
19 1986). Uncontroverted allegations in the complaint must be taken
20 as true. AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588
21 (9th Cir. 1996). However, the court may not assume the truth of
22 such allegations if they are contradicted by affidavit. Data Disc., Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1284
23 (9th Cir. 1977). If the plaintiff also submits admissible
24 evidence, conflicts in the evidence must be resolved in the
25 plaintiff's favor. AT&T, 94 F.3d at 588.

27 There are two independent limitations on a court's power to
28 exercise personal jurisdiction over a non-resident defendant: the

1 applicable state personal jurisdiction rule and constitutional
2 principles of due process. Sher v. Johnson, 911 F.2d 1357, 1361
3 (9th Cir. 1990); Data Disc, Inc., 557 F.2d at 1286. California's
4 jurisdictional statute is co-extensive with federal due process
5 requirements; therefore, jurisdictional inquiries under state law
6 and federal due process standards merge into one analysis. Rano v.
7 Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993).

8 The exercise of jurisdiction over a non-resident defendant
9 violates the protections created by the due process clause unless
10 the defendant has "minimum contacts" with the forum State so that
11 the exercise of jurisdiction "does not offend traditional notions
12 of fair play and substantial justice." International Shoe Co. v.
13 Washington, 326 U.S. 310, 316 (1945). Personal jurisdiction may be
14 either general or specific. Because Asis only claims specific
15 jurisdiction, the Court does not address general jurisdiction.

16 Specific jurisdiction exists where the cause of action arises
17 out of or relates to the defendant's activities within the forum.
18 Data Disc, Inc., 557 F.2d at 1286. Specific jurisdiction is
19 analyzed using a three-prong test: (1) the non-resident defendant
20 must purposefully direct its activities or consummate some
21 transaction with the forum or a resident thereof, or perform some
22 act by which it purposefully avails itself of the privilege of
23 conducting activities in the forum, thereby invoking the benefits
24 and protections of its laws; (2) the claim must be one which arises
25 out of or results from the defendant's forum-related activities;
26 and (3) the exercise of jurisdiction must be reasonable. Lake v.
27 Lake, 817 F.2d 1416, 1421 (9th Cir. 1987). Each of these
28 conditions is required for asserting jurisdiction. Insurance Co.

1 of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir.
2 1981).

3 A. Purposeful Direction and Availment

4 A showing that a defendant "purposefully directed" its conduct
5 toward a forum State "usually consists of evidence of the
6 defendant's actions outside the forum state that are directed at
7 the forum, such as the distribution in the forum state of goods
8 originating elsewhere." Schwarzenegger, 374 F.3d at 803. For
9 intentional tort cases, purposeful direction is analyzed under the
10 "effects" test derived from Caulder v. Jones, 465 U.S. 783, 788-89
11 (1984). Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir.
12 2002). The "effects test" requires that the defendant have
13 (1) committed an intentional act, (2) expressly aimed at the forum
14 State, (3) causing harm that the defendant knows is likely to be
15 suffered in the forum State. Id.

16 A showing that a defendant "purposefully availed" itself of
17 the privilege of doing business in a forum State typically consists
18 of evidence of the defendant's actions in the forum, such as
19 executing or performing a contract there. Schwarzenegger, 374 F.3d
20 at 802. The requirement of purposeful availment ensures that the
21 defendant should reasonably anticipate being haled into the forum
22 State court based on its contacts. World-Wide Volkswagen Corp. v.
23 Woodson, 444 U.S. 286, 297 (1980). The purposeful availment test
24 is met where "the defendant has taken deliberate action within the
25 forum state or if he has created continuing obligations to forum
26 residents." Ballard, 65 F.3d at 1498.

27 In Dole Foods, the court found that where the foreign
28 defendants communicated directly and substantially with the

1 plaintiffs with the purpose of causing the plaintiffs' harm, the
2 defendants had expressly aimed their acts at the forum State. Dole
3 Foods, 303 F.3d at 1112-14. Similarly, Asis alleges that
4 Imarketing purposefully sent mass commercial emails to Asis for its
5 own commercial gain. The harm to Asis was felt in Northern
6 California, where Asis is located. Imarketing knew that Asis would
7 likely suffer harm there because Asis's server is registered as
8 being located in Northern California. See also Panavision, 141
9 F.3d at 1321. The Court finds that Imarketing directed its conduct
10 toward California and purposefully availed itself of the privilege
11 of doing business here.

12 B. Arising Out of Forum-Related Activities

13 The second factor requires that the claim arise out of or
14 result from the defendant's forum-related activities. A claim
15 arises out of a defendant's conduct if the claim would not have
16 arisen "but for" the defendant's forum-related contacts.
17 Panavision Int'l v. L.P.v. Toeppa, 141 F.3d 1316, 1322 (9th Cir.
18 1998).

19 This test is satisfied because, but for Imarketing's allegedly
20 sending mass commercial emails to Asis's server, Asis would not
21 have been harmed. Thus, Asis's claims arise directly out of
22 Imarketing's alleged activities.

23 C. Reasonableness

24 Once the plaintiff has satisfied the first two factors, the
25 defendant bears the burden of overcoming a presumption that
26 jurisdiction is reasonable by presenting a compelling case that
27 specific jurisdiction would be unreasonable. Burger King Corp. v.
28 Rudzewicz, 471 U.S. 462, 472-73 (1985); Haisten v. Grass Valley

1 Medical Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986). Seven
2 factors are considered in assessing whether the exercise of
3 jurisdiction over a non-resident defendant is reasonable: (1) the
4 extent of the defendant's purposeful interjection into the forum
5 State's affairs, (2) the burden on the defendant of defending in
6 the forum, (3) conflicts of law between the forum State and the
7 defendant's home jurisdiction, (4) the forum State's interest in
8 adjudicating the dispute, (5) the most efficient judicial
9 resolution of the dispute, (6) the plaintiff's interest in
10 convenient and effective relief, and (7) the existence of an
11 alternative forum. Caruth v. International Psychoanalytical Ass'n,
12 59 F.3d 126, 128 (9th Cir. 1995); Roth v. Garcia Marquez, 942 F.2d
13 617, 623 (9th Cir. 1991).

14 a. Purposeful Interjection

15 "Even if there is sufficient interjection into the state to
16 satisfy the purposeful availment prong, the degree of interjection
17 is a factor to be weighed in assessing the overall reasonableness
18 of jurisdiction under the reasonableness prong." Core-Vent, 11
19 F.3d at 1488 (internal quotations and citations omitted). In
20 Panavision, the Ninth Circuit found that the purposeful
21 interjection factor weighed strongly in the plaintiff's favor based
22 on the fact that the defendant acted "knowing that" its
23 registration of the plaintiff's domain name "would likely injure"
24 plaintiff who was located in California. Panavision, 141 F.3d at
25 1323. Asis alleges that Imarketing "should have known that they
26 would be subject to the jurisdiction and laws of the forum when
27 commercial emails were sent to email accounts at a Northern
28 California Internet Access Provider. Complaint at ¶ 6. Thus, Asis

1 satisfies the purposeful interjection prong, which weighs in favor
2 of the Court's personal jurisdiction.

3 b. Defendant's Burden in Litigating

4 A defendant's burden in litigating in the forum is a factor in
5 the assessment of reasonableness, but unless the "inconvenience is
6 so great as to constitute a deprivation of due process, it will not
7 overcome clear justifications for the exercise of jurisdiction."

8 Caruth v. International Psychoanalytical Ass'n, 59 F.3d 126, 128-29
9 (9th Cir. 1995) (citing Roth v. Garcia Marquez, 942 F.2d 617, 623
10 (9th Cir. 1991)).

11 The burden on Imarketing, a Florida business with no other
12 connections to California, is significant, but the inconvenience is
13 not so great as to deprive Imarketing of due process. See
14 Panavision, 141 F.3d at 1323 (finding an Illinois defendant's
15 burden in litigating in California significant, but not
16 unreasonable). Because of modern technology such as fax machines,
17 requiring Imarketing to litigate in California is not
18 constitutionally unreasonable. See Dole Foods, 303 F.3d at 1115
19 (stating, "modern advances in communications and transportation
20 have significantly reduced the burden of litigating in another
21 country"); Panavision, 141 F.3d at 1323 (same).

22 c. Sovereignty

23 This factor concerns the extent to which the district court's
24 exercise of jurisdiction in California would conflict with the
25 sovereignty of Florida, Imarketing's domicile. Core-Vent, 11 F.3d
26 at 1489. Such a conflict is not a concern in this case. The
27 allegations in support of Asis's claims under the CAN-SPAM Act, a
28 federal law, require the same analysis in either Florida or

1 California. In this circumstance, the exercise of jurisdiction by
2 a federal court in California does not implicate sovereignty
3 concerns of Florida.

4 d. Forum State's Interest

5 "California maintains a strong interest in providing an
6 effective means of redress for its residents tortiously injured."
7 Gordy v. Daily News, L.P., 95 F.3d 829, 836 (9th Cir. 1996) (citing
8 Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1200 (9th Cir.
9 1988)). Asis's server and its principal place of business is in
10 California. This factor weighs in Asis's favor.

11 e. Efficient Resolution

12 This factor focuses on the location of the evidence and
13 witnesses. Caruth, 59 F.3d at 129. It is no longer weighed
14 heavily given the modern advances in communication and
15 transportation. Id.; Panavision, 141 F.3d at 1323. Both Asis and
16 Imarketing indicate they have witnesses and evidence in their
17 respective forums. Because neither party presents a stronger case,
18 this factor is neutral.

19 f. Convenience to Asis

20 "In evaluating the convenience and effectiveness of relief for
21 the plaintiff, we have given little weight to the plaintiff's
22 inconvenience." Panavision, 141 F.3d at 1324; Ziegler, 64 F.3d at
23 476. It may be somewhat more costly and inconvenient for Asis to
24 litigate in another forum, but the burden on Asis is relatively
25 slight. This factor is essentially neutral, weighing only slightly
26 in Asis's favor.

27

28 g. Alternative Forum

1 Asis has not demonstrated the unavailability of an alternative
2 forum. In this case, Florida is an alternative forum. As stated
3 above, it may be more costly and inconvenient for Asis to litigate
4 in Florida, but this is not an unreasonable burden. This factor
5 weighs in Imarketing's favor.

6 h. Balancing the Reasonableness Factors

7 In balancing these factors, some factors weigh in Imarketing's
8 favor, but it fails to present a compelling case that the district
9 court's exercise of jurisdiction in California would be
10 unreasonable. Therefore, all of the requirements for the exercise
11 of specific jurisdiction are satisfied. The Court has personal
12 jurisdiction over Imarketing.

13 II. Motion to Transfer

14 Title 28 U.S.C. § 1404(a) provides as follows: "For the
15 convenience of parties and witnesses, in the interest of justice, a
16 district court may transfer any civil action to any other district
17 or division where it might have been brought." The statute
18 identifies three basic factors for district courts to consider in
19 determining whether a case should be transferred: (1) convenience
20 of the parties; (2) convenience of the witnesses; and (3) the
21 interests of justice. The Ninth Circuit has articulated other
22 considerations that are subsumed in these basic factors, including:
23 the plaintiff's choice of forum; ease of access to the evidence;
24 the familiarity of each forum with the applicable law; the nexus
25 between the forum and the causes of action; the parties' contacts
26 with the forums; and any difference in the costs of litigation
27 between the two forums. Decker Coal Co. v. Commonwealth Edison
28 Co., 805 F.2d 834, 843 (9th Cir. 1986); Jones v. GNC Franchising,

1 Inc., 211 F. 3d 495, 498-99 (9th Cir. 2000). No single factor is
2 dispositive, and a district court has broad discretion to
3 adjudicate motions for transfer on a case-by-case basis. Stewart
4 Org. Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988); Sparling v.
5 Hoffman Constr. Co., Inc., 964 F.2d 635, 639 (9th Cir. 1988).

6 A. Plaintiff's Choice of Forum

7 Ordinarily, the plaintiff's choice of forum is given
8 significant weight and will not be disturbed unless other factors
9 weigh substantially in favor of transfer. Decker, 805 F.2d at 843.
10 This is especially true when the forum chosen by a plaintiff is its
11 domicile and its cause of action has a significant connection with
12 the forum. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 89
13 F.R.D. 497, 499 (C.D. Cal. 1981) (citing Pac. Car and Foundry Co.
14 v. Pence, 403 F.2d 949, 954 (9th Cir. 1968)). However, "if the
15 operative facts have not occurred within the forum of original
16 selection and that forum has no particular interest in the parties
17 or the subject matter, the plaintiff's choice is entitled only to
18 minimal consideration." Ctr. for Biological Diversity and Pac.
19 Env't v. Kempthorne, 2007 WL 2023515, at *3 (N.D. Cal.) (quoting
20 Pac. Car and Foundry, 403 F.2d at 954)); see also Lou v. Blezberg,
21 834 F.2d 730, 739 (9th Cir. 1987).

22 Asis's choice of forum is entitled to considerable deference,
23 and should not easily be overturned. Gulf Oil Corp. v. Gilbert,
24 330 U.S. 501, 508 (1947).

25 B. Interest in Litigation

26 Florida has an interest in regulating the conduct of
27 corporations organized under its laws. Edgar v. MITE Corp., 457
28 U.S. 624, 645 (1982); Decker, 805 F.2d at 843. However, this case

1 is not a complex matter involving the intricacies of Imarketing's
2 corporate governance. Imarketing has not suggested that a
3 resolution of this case will turn on the nuances of Florida law.
4 Accordingly, Florida's interest in the matter is attenuated and
5 does not provide sufficient reason to depart from Asis's choice of
6 forum.

7 C. Convenience for the Parties and Witnesses

8 This Court is a more convenient forum for Asis because Asis is
9 located in Northern California. On the other hand, CAN-SPAM
10 litigation in California would be inconvenient and expensive for
11 Imarketing.

12 A transfer to Florida would simply shift the burden of
13 inconvenience from Imarketing to Asis. Because transfer of venue
14 should not be used to shift the burden of inconvenience from one
15 party to another, the convenience of the parties does not provide
16 basis for transferring this case to the Southern District of
17 Florida.

18 Imarketing submits the Clouse declaration in which Mr. Clouse
19 states that Imarketing's witnesses in this case are located in
20 Florida and that Florida would be a more convenient forum for them
21 than California. The principle that transfer may not be used to
22 shift an inconvenience from one party to another operates with
23 respect to witnesses as well as to parties. Decker, 805 F.2d at
24 843. Imarketing's witnesses in this case are all individuals
25 associated with Imarketing, and there is no indication that they
26 would not appear to testify if the case remained in the Northern
27 District of California. Therefore, the convenience of witnesses
28 does not provide grounds for transfer.

1 D. Access to the Evidence

2 Mr. Clouse declares that Imarketing's evidence is located in
3 Florida. Presumably, Asis's evidence is in California. Thus, this
4 factor is neutral.

5 E. Location of Events Giving Rise to the Causes of Action

6 The emails were allegedly sent by Imarketing in Florida. Asis
7 alleges it was harmed by receiving the emails on its server which
8 is located in California. Accordingly, this factor is neutral.

9 F. Difference in Costs of Litigation

10 Imarketing argues that litigation in this district would be
11 more costly for it than litigation in the Southern District of
12 Florida because there are more witnesses and evidence in Florida.
13 As stated above, Imarketing has not shown that its litigation in
14 California would be more costly than Asis's having to litigate in
15 Florida. There is no indication that litigation expenses in
16 general are less in Florida. Therefore, this factor is neutral.

17 G. Summary of Factors

18 After considering the convenience and fairness to the parties
19 and the interests of justice, the Court concludes that the factors
20 tip in favor of litigating this action in California. Therefore,
21 Imarketing's motion to transfer venue is DENIED.

22 III. Dismissal for Failure to State a Claim

23 A complaint must contain a "short and plain statement of the
24 claim showing that the pleader is entitled to relief." Fed. R.
25 Civ. P. 8(a). When considering a motion to dismiss under Rule
26 12(b)(6) for failure to state a claim, dismissal is appropriate
27 only when the complaint does not give the defendant fair notice of
28 a legally cognizable claim and the grounds on which it rests. See

1 Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1964
2 (2007).

3 In considering whether the complaint is sufficient to state a
4 claim, the court will take all material allegations as true and
5 construe them in the light most favorable to the plaintiff. NL
6 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
7 Although the court is generally confined to consideration of the
8 allegations in the pleadings, when the complaint is accompanied by
9 attached documents, such documents are deemed part of the complaint
10 and may be considered in evaluating the merits of a Rule 12(b)(6)
11 motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th
12 Cir. 1987).

13 When granting a motion to dismiss, the court is generally
14 required to grant the plaintiff leave to amend, even if no request
15 to amend the pleading was made, unless amendment would be futile.
16 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
17 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
18 would be futile, the court examines whether the complaint could be
19 amended to cure the defect requiring dismissal "without
20 contradicting any of the allegations of [the] original complaint."
21 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
22 Leave to amend should be liberally granted, but an amended
23 complaint cannot allege facts inconsistent with the challenged
24 pleading. Id. at 296-97.

25 The CAN-SPAM Act makes it "unlawful for any person to initiate
26 the transmission, to a protected computer, of a commercial
27 electronic mail message . . . that contains, or is accompanied by,
28 header information that is materially false or materially

1 misleading." 15 U.S.C. § 7704(a)(1).

2 The Act defines "materially false or misleading" as:

3 header information that is technically accurate
4 but includes an originating electronic mail
5 address, domain name, or Internet Protocol
6 address the access to which for purposes of
initiating the message was obtained by means of
false or fraudulent pretenses or
representations . . .

7 15 U.S.C. § 7704(a)(1)(A). The Act defines "materially" to
8 "include the alteration or concealment of header information" in a
9 manner that would impair the ability of an ISP to locate, identify
10 or respond to a person who initiated the message. 15 U.S.C.
11 § 7704(a)(6).

12 Header information is defined as:

13 the source, destination, and routing
14 information attached to an electronic mail
15 message, including the originating domain name
and originating electronic mail address, and
any other information that appears in the line
identifying, or purporting to identify, a
16 person initiating a message.

17 15 U.S.C. § 7702(8).

18 Where there are allegations that the contents of the emails,
19 including the header information, are fraudulent, Federal Rule of
20 Civil Procedure 9(b) applies to those particular averments of
21 fraud. Asis Internet Services v. Optin Global, Inc., 2006 WL
22 1820902, *4 (N.D. Cal.). "In alleging fraud or mistake, a party
23 must state with particularity the circumstances constituting fraud
24 or mistake." Fed. R. Civ. P. 9(b). However, Rule 9(b)'s
25 specificity requirement does not apply to allegations regarding the
26 origination of the addresses to which the emails were sent, only to
27 the emails' content. Id.

28

1 A. Header information

2 Imarketing first argues that Asis failed to plead with the
3 requisite particularity that the header information is materially
4 false or misleading.

5 In its complaint, Asis alleges that the headers Imarketing
6 used violated § 7704(a)(1) because they showed a domain name which
7 is registered to Domains by Proxy, a protection service that keeps
8 the identity of its registrants confidential; a subpoena is
9 necessary in order to obtain information from Domains By Proxy.
10 This impairs the ability of an ISP to locate, identify or respond
11 to the person who initiated the message. Assuming without deciding
12 that such a claim must be plead with particularity, it is
13 sufficiently alleged. Imarketing provides no argument or authority
14 to dispute Asis's claim that such conduct violates the act.

15 In its opposition, Asis argues an additional theory for
16 violation of this section. It points out that Exhibit C attached
17 to the complaint, which is a copy of the website of Domains By
18 Proxy, indicates that Domains By Proxy requires its customers to
19 represent that the domain name it provides to them will not be used
20 to transmit spam. Asis argues that, because Imarketing transmitted
21 spam, it acquired its domain name by a false representation in
22 violation of 15 U.S.C. § 7704(a)(1)(A). This theory, however, is
23 not alleged in the complaint. If Asis wishes to pursue it, Asis
24 must allege it in its amended complaint.¹

25
26 _____
27 ¹Asis does not allege a claim under 15 U.S.C. § 7704(a)(2) which
28 would require it to allege that Imarketing had actual knowledge or
knowledge fairly implied on the basis of objective circumstances that
a subject heading would be likely to mislead a recipient about a
material fact regarding the content or subject matter of the message.

1 B. Directory Harvest and Automated Creation of Email
2 Accounts

3 Imarketing argues that Asis's allegations that Imarketing used
4 a "directory harvest or other illegal means" to procure email
5 addresses are not sufficient because Asis redacts the email
6 addresses to which the emails were sent, and therefore Imarketing is
7 without notice as to Asis's claims pursuant to § 7704(b)(1)
8 (prohibiting address harvesting) and § 7704(b)(2)(2) (prohibiting
9 automated created of multiple electronic email accounts).

10 Asis responds that recipient information is its protected
11 corporate information and to release the addresses would expose it
12 to potential attacks by unscrupulous persons. In its opposition,
13 Asis indicates that it will provide the entire set of emails without
14 redaction when a protective order is in place restricting its
15 corporate information to attorneys only.

16 As indicated above, Rule 9(b)'s heightened pleading standard
17 does not apply to the initiation of the emails; therefore, Rule 8's
18 notice pleading standard applies here. Asis alleges that none of
19 the email accounts receiving emails were active and could have only
20 been discovered by directory harvest or other illegal means in
21 violation of § 7704(b)(1) and (2). Complaint at ¶ 15. Additionally,
22 Asis alleges that Imarketing "used an automated creation of multiple
23 email accounts." Asis explains that the emails were sent from an
24 account using the advertiser's name as the first portion of the
25 email account name, followed by various sub-domain names and the
26 primary domain name, which "indicates the email accounts were
27 generated programmatically using a database of information
28 containing the advertisers [sic] identities." Complaint at ¶ 16.
These claims are sufficiently stated to satisfy Rule 8's notice

1 pleading standard.

2 Imarketing also complains that Asis makes its allegations
3 against Defendants collectively. However, Asis has named only one
4 Defendant.

5 Imarketing argues that Asis fails to state a claim under the
6 CAN-SPAM Act because the sample emails attached as exhibits to the
7 complaint do not violate all of the elements of the CAN-SPAM Act.
8 Section 7706(g)(1) of the CAN-SPAM Act provides that "a provider of
9 Internet access service adversely affected by a violation of section
10 7704(a)(1) of this title, 7704(b) of this title, or 7704(d) of this
11 title . . . may bring a civil action . . ." Therefore, any one of
12 these is actionable. Furthermore, the declaration of Robert Clouse
13 referred to by Imarketing is inadmissible on a motion to dismiss for
14 failure to state a claim. Imarketing's motion to dismiss on this
15 ground is denied.

16 Imarketing also argues that the subject lines of the emails
17 attached as exhibits indicate that they are not false. However, as
18 Asis points out, it does not allege a claim under § 7704(a)(2) which
19 addresses deceptive subject lines. Therefore, Imarketing's motion
20 to dismiss on this ground is denied.

21 Finally, Imarketing argues that Asis has failed to allege that
22 it has been injured by receiving the subject emails. In its
23 opposition, Asis indicates that it has been adversely affected
24 because it must process the emails on its server and have its agents
25 investigate the emails. However, Asis does not allege this adverse
26 effect in its complaint. Therefore, Imarketing's motion is granted
27 on this ground; Asis is granted leave to amend to allege how it was
28 adversely affected.

1 V. CONCLUSION

2 For the foregoing reasons, the Court DENIES Imarketing's motion
3 to dismiss for lack of personal jurisdiction, DENIES Imarketing's
4 motion to transfer venue, GRANTS in part Imarketing's motion to
5 dismiss and GRANTS Asis leave to amend. The amended complaint shall
6 be filed with two weeks from the date of this order. A case
7 management conference shall be held on August 7, 2008 at 2:00 pm.
8 If Imarketing wishes to file a motion to dismiss the amended
9 complaint, it shall notice such motion for hearing on the same date
10 as the case management conference.

11 IT IS SO ORDERED.

12
13
14 Dated: 5/16/08
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16



Claudia Wilken
UNITED STATES DISTRICT JUDGE